No. 77-1660

In the Supreme Court of the United States

OCTOBER TERM, 1978

ABLE CONTRACTORS, INC., PETITIONER

v.

F. RAY MARSHALL, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioner contends that before an inspection of its premises can be made under the Occupational Safety and Health Act, 84 Stat. 1590, 29 U.S.C. 634, the Secretary of Labor must establish in a judicial proceeding that petitioner is engaged in a business affecting commerce.

1. The Act creates a single adjudicatory body—the Occupational Safety and Health Review Commission—that is authorized to pass on factual and legal defenses to the Secretary's enforcement actions subject to appellate review. The Commission is empowered to issue an order vacating the Secretary's citation or proposed penalty. *Atlas Roofing Co.* v. *Occupational Safety and Health Review Commission*, 430 U.S. 442, 444-447; *In re Restland Memorial Park*, 540 F. 2d 626, 627-628 (C.A. 3); 29 U.S.C. 659(c). Its authority can be invoked by filing a

notice of contest if a citation issues. *Atlas Roofing, supra,* 430 U.S. at 446-447. And the Commission has authority to vacate a citation on finding that it resulted from an inspection that was conducted "unreasonably" (29 U.S.C. 657(a)) or was issued to an employer whose operations do not affect commerce (29 U.S.C. 652(5)). See *In re Restland Memorial Park, supra; Godwin* v. *Occupational Safety and Health Review Commission,* 540 F. 2d 1013, 1014-1016 (C.A. 9).

The Secretary made several attempts to inspect petitioner's construction worksites in Montana. Petitioner denied access to the Secretary's compliance officers. The Secretary then sought an order from the United States District Court for the District of Montana that would compel petitioner to submit to an inspection. Petitioner asserted in the district court that, before the Secretary could conduct an inspection, he must establish that petitioner is an employer engaged in a business affecting commerce (Pet. App. 1a-2a; 2b).[1] The district court rejected petitioner's contention and issued an order stating that the Secretary could inspect petitioner's worksites "at reasonable times in a reasonable manner and within reasonable limits." The court noted that (Pet. App. 2b):

> The United States Supreme Court has * * * provided that coverage by a Congressional Act, such as OSHA, need not be established prior to an examination or inspection. See *Endicott-Johnson Corp.* v. *Perkins,* 317 U.S. 501 (1943).

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[1]29 U.S.C. 652(5) defines an "employer" for purposes of the Occupational Safety and Health Act as "a person engaged in a business affecting commerce."

The court of appeals affirmed (Pet. App. 1a-5a). It held that "[p]rimary jurisdiction to determine questions of OSHA coverage is lodged in the statutorily created organ for hearing appeals of OSHA violations citations, the Occupational Safety and Health Review Commission," that "[petitioner] should raise the question of statutory coverage in an administrative appeal contesting the validity of any citation it may receive as a result of OSHA inspections," and that "before a federal court reviews the question of OSHA jurisdiction sound judicial policy requires that [petitioner] exhaust its administrative remedies" (Pet. App. 2a-3a).

2. The decision below is correct, and there is no conflict in decisions on this question. Other courts agree with the court below that an inspection need not be preceded by proof that the employer is engaged in or affects interstate commerce, and that the Commission is the proper forum to resolve such contentions in the first instance. See, *e.g., In re Restland Memorial Park, supra,* 540 F. 2d at 627-628. Indeed, this Court consistently has held that an administrative agency can use its investigatory powers without a prior conclusive showing of statutory coverage. See *Oklahoma Press Publishing Co.* v. *Walling,* 327 U.S. 186, 213-214; *Endicott-Johnson Corp.* v. *Perkins,* 317 U.S. 501, 508-509.

Petitioner's assertion (Pet. 7-8) that the inspection order issued in this case violates the Fourth Amendment fares no better. The court of appeals properly declined to reach that issue, because it had not been raised in the district court (Pet. App. 4a). Petitioner thus has not preserved the issue for presentation to this Court. In all events, the contention is groundless. The district court ordered a limited administrative inspection of petitioner's premises after a full adversary hearing. The court ordered that the inspection be made only "at reasonable times in a

reasonable manner" (Pet. App. 2b). An inspection order issued by a district court after a full adversary hearing offers the employer even greater protection then an *ex parte* search warrant. It is at least "the functional equivalent of a warrant." See *Marshall* v. *Barlow's, Inc.*, No. 76-1143, decided May 23, 1978, slip op. 17 n. 23.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

CARIN ANN CLAUSS,
Solicitor of Labor,
Department of Labor.

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